

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Conlin-Strawberry Water Co. Inc. (U-177-W), and its Owner/Operator, Danny T. Conlin; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the Superior Court for a Receiver to Assume Possession and Operation of the Conlin-Strawberry Water Co. Inc. pursuant to the California Public Utilities Code Section 855.

Investigation 03-10-038
(Filed October 16, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON MOTION TO STRIKE**

Respondent Colin-Strawberry Water Company has filed its Motion to Strike Portions of Staff Prepared Testimony (April 6, 2004). This testimony consists of declarations (most with attachments) by certain ratepayer and staff witnesses submitted by the Water Division. Respondent argues that the submitted prepared testimony deviates considerably from the form of prepared testimony typically used in Commission proceedings. In its detailed discussion, respondent also raises foundational and relevance objections to the admissibility of certain documents. These objections, essentially motions in limine, are more appropriately considered at the final prehearing conference (PHC). The Water Division has responded to the motion. Response of Water Division (April 12, 2004).

Rule 68 of the Commission's Rules of Practice and Procedure addresses the use of prepared testimony, but it does not sufficiently describe how such testimony traditionally is prepared and used before the Commission. In most Commission proceedings, prepared testimony contains an almost verbatim, detailed account of the witness's anticipated direct testimony at an evidentiary hearing. Prepared testimony in this format has many advantages for Commission proceedings. Depositions and other discovery are reduced since the opposing side has a complete account of the witness's knowledge or expert opinion. Even without depositions and other discovery, parties are able to use the prepared testimony to prepare their cross-examination of the witnesses. In enforcement proceedings such as this case, the responding parties are provided with notice of the facts supporting the allegations. Finally, hearing time is reduced since the prepared testimony may be admitted into evidence upon direct examination of the witness, thereby allowing cross-examination to proceed immediately.

Because the Commission seeks to authorization to establish a receivership for the water company, one of the most drastic remedies that may be sought under the Public Utilities Code, the respondent's substantial and procedural rights, including adequate notice of the alleged material facts to be used against the company at hearing, must be safeguarded during the proceeding. Much of the Water Division's submitted testimony does not meet the standard of affording adequate notice of these alleged material facts to allow respondent to prepare for hearing. Many of the declarations are both vague and cryptic. Many declarations incorporate partial transcripts of a nine-year old hearing in Case 95-01-038 without specifying what information is relevant to the present

proceeding. One staff declaration only attaches tables and worksheets without explaining their significance.

Respondents' motion to strike contains other detailed arguments why specific declarations and attachments should be stricken. At present, I only decide whether the declarations are sufficient in alerting respondent to the specific material allegations that must be defended against. I do not decide other evidentiary issues that may be raised; and, to the extent respondent's motion raises these other evidentiary questions, they may be reserved until the final PHC. I now turn to the specific documents identified by respondent.

Declaration of William Rugg

Mr. Rugg's declaration consists of 16 paragraphs and an attachment of 48 pages of his testimony during the 1995 hearing in C.95-01-038. Respondent argues that much of the declaration is not based on personal knowledge and provides no specific facts concerning the issues in this proceeding.

Without resolving other evidentiary issues concerning this declaration, I find that the declaration does not explain or specify which of the various problems described in the attached 1995 transcript continue to the present and might tend to establish one or more of the major allegations set forth in the Order Instituting Investigation (OII). The Water Division's "incorporation by reference" of this transcript, without more explanation, fails to provide respondent with adequate notice of the allegations to defend against. Without additional specification in the declaration or prepared testimony, the transcript may not be offered as evidence.

Rugg's declaration specifically incorporates only the partial transcript. The declaration actually submitted to my office was also accompanied with many loose documents including a letter on Rugg's letterhead (Sept. 13, 1995), a

letter on the Strawberry Property Owners' Ass'n letterhead (Sept. 25, 1996), Petition for Modification in C.95-01-038 (Jan. 16, 1997), Petition for Modification of Decision in C.95-01-038 (Feb. 19, 1997), a letter on Rugg's letterhead (May 21, 1998), a letter on the Strawberry Property Owners' Ass'n letterhead (Sept. 7, 2001), a complaint filed by the Strawberry Property Owners' Ass'n (May 17, 2001), and three sets of association meeting minutes (July 6, 1996; May 25, 2002; and July 5, 2003). It is unclear whether these documents are intended to be part of a declaration or prepared testimony. Without more explanation and foundation, they will be disregarded.

Declaration of Robert Rutherford

Mr. Rutherford's declaration also incorporates his testimony at the July 1995 hearing. The declaration indicates that "most if not all" of the problems still remain unresolved. The declaration is not specific, but the transcript describes only two problems in 1995: sand accumulation in the pipes and the potential of pipe freezing due to some pipes being on top of the ground. Since the possible defects are limited to two, this provides respondents with sufficient notice to prepare for hearing. The declaration and transcript may be offered as evidence, but only as to post-1995 sand accumulation and exposed pipe issues.

Declaration of Frank Helm

The Water Division has indicated that Mr. Helm will not testify at the hearing. Respondents have indicated that they will object at that time (preferably at the final PHC) to the receipt of the declaration in evidence. I will rule on that motion in limine when it is made, and, if denied, respondents may renew their specific objections to the declaration at that time.

Declaration of Dennis Kelley

Unlike other declarations, Mr. Kelley's declaration does not incorporate prior testimony. It describes water leakage that has damaged an access road, the work residents did to repair the road, and current problems with the Tanager Drive culvert and a hole in the street. The declaration has four recent photographs as attachments. The declaration lacks dates concerning the leakage, but overall, the declaration provides respondents with adequate notice of post-1995 issues so that they may prepare testimony and cross-examination. The declaration may be offered as evidence.

Declaration of Elizabeth Bandle

Respondents do not object to the basic declaration since it describes the company's response to the 2002 power outage. Respondents do object to the incorporation of the partial transcript from the July 13, 1995, hearing where inadequate phone coverage and several other issues were discussed (pressure, flow fluctuations, sufficient water and pressure for fires, rusted pipes, and boil and conserve water notices). The declaration fails to specify which, if any, of these past problems described in the transcript still continue—thereby depriving respondents of their ability to prepare testimony and cross-examination. Without additional specification in the declaration or prepared testimony, the transcript may not be offered as evidence.

Declaration of Ed Lodi

Mr. Lodi's declaration discusses present-day leaks in the Dymond tank and problems with obtaining timely responses from the company. The declaration incorporates a 30-page partial transcript of Lodi's testimony at the 1995 hearing. The declaration also says that the witness "will testify that most if not all of the CWSC water service problems that I stated in 1995 have to day

remained unresolved.” The transcript discusses past problems concerning leaks and outages, but most of the transcript describes many futile efforts by residents to obtain timely responses from the company. Since the declaration and transcript are imprecise about what, if any leaks and outages still continue, those portions may not be offered as evidence. The 1995 discussion of unresponsiveness, however, in conjunction with Lodi’s statements in paragraph 6 of this declaration, may support the inference that the company’s unresponsive has been continuous. This portion of the transcript gives notice to the respondent about one allegedly major problem, and this portion may be offered as evidence.

Declaration of Herbert Chow

Mr. Chow, a staff witness, provided a one-page verification indicating the truth of four attachments (mostly charts and tables) to the one-page document. No narrative accompanies or explains these attachments.

As respondent indicates, Attachment 1 is variously titled “Inventory of incomplete data responses to Data Request Set No. 3,” and “List of Documents Received from Conlin Strawberry Water Company, Inc.” Given this contradiction, the Attachment is untrustworthy, does not provide notice, and may not be offered as evidence.

Attachment 2 includes what appear to be two data requests submitted to Dolores Conlin. In his one-page verification, Chow describes these as requests “which remain unanswered.” I have separately ruled that this discovery, by way of data requests, was improper since these requests were not served on respondent’s attorney. While the Commission has ongoing inspection and audit authority, the failure to serve such requests on the attorney of a represented

party during a contested adjudicatory proceeding is impermissible. Attachment 2 may not be offered as evidence.

Attachment 3 is titled “Flow Chart of SDWBA Construction Claims to Reimbursements and Payments.” Respondent argues that he does not know what Chow seeks to demonstrate with this chart. In large part, the chart speaks for its self as to the distribution of loan proceeds from the Department of Water Resources (DWR). To this extent, the attachment gives notice to respondent and can be offered as evidence. The attachment, however, does not indicate the specific purposes for which individual checks were made. If Chow seeks to testify about his findings as to permissible or impermissible disbursements, additional prepared testimony will be necessary to provide respondent with notice of these findings and conclusions.

Attachment 4 has two parts. One part is described as three repayment schedules for DWR loans, 1988-2003. This attachment is largely self-explanatory, provides respondent with notice, and may be offered as evidence. The second part is a flow chart of SDWBA surcharges that includes opinions, conclusions, and editorial comments. The document is not clear on its face as to the conclusions apparently reached by Chow. Without more explanation so that respondent has notice of these findings and conclusions, the document may not be offered as evidence.

Remedy

Since the Water Division has failed to provide respondent with adequate notice about major parts of the division’s case, the question is what curative measure and/or sanction should be employed. The deadline for the Water Division’s prepared testimony (April 2) has now passed, and the Water Division must have the consent of the assigned ALJ to prepare more complete

declarations or prepared testimony from its witnesses. An adequate and reasonable basis for not providing such consent is that this episode has disrupted the schedule for this proceeding, which already has been once delayed. Any further delays will make it difficult to complete this proceeding within the twelve-month timeframe for adjudicatory cases.

By initiating this OIL, however, the Commission has emphasized the importance of determining whether its prior orders have been satisfied and if respondent's operations satisfy applicable law. The ratepayer witnesses were undoubtedly relying on the Water Division for guidance in drafting their prepared testimony. This excuse is untenable for the Water Division's own staff witness, but that witness' testimony is necessary to reach the determinations required by the OIL.

IT IS RULED as follows:

1. Respondent's motion to strike is granted in part and denied in part as set forth in the above discussion of the individual declarations and attachments. Respondent's other evidentiary objections are reserved until the final Prehearing Conference or hearing.
2. The Water Division is granted leave to amend those declarations. These amended declarations or other form of prepared testimony will be served on or before Tuesday, April 27, 2004.
3. Because of the pendency of the motion to strike, on April 15, 2004, I extended the deadline for respondent's prepared testimony to April 21, 2004. As a result of this ruling, the respondent's time to serve prepared testimony is further extended to 5:00 p.m., Monday, May 3, 2004.
4. The remaining schedule for this proceeding, set forth in the Administrative Law Judge Ruling of March 11, 2004, is confirmed.

Dated April 19, 2004, at San Francisco, California.

/s/ JOHN E. THORSON

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling on Motion to Strike on all parties of record in this proceeding or their attorneys of record.

Dated April 19, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at

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(415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.